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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE STATE OF OKLAHOMA,
Petitioner,
vs.
MONTY LEE EDDINGS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

Whether it is a violation of equal protection and due process of the law for a defendant who waives jury trial and receives the death penalty from a judge, and whose death sentence is vacated on appeal and remanded for a new sentencing, to receive the death sentence a second time when a defendant who is sentenced by a jury and whose death sentence is set aside on appeal may not be resentenced to death.

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PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

The Petitioner, the State of Oklahoma, by the Attorney General of Oklahoma, Michael C. Turpen, prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals in this matter.

OPINIONS BELOW

The Decision of the Oklahoma Court of Criminal Appeals from which the certiorari is sought is reported as Eddings

v. State, 688 P.2d 342 (Okl.Cr. 1984). See Appendix A. This opinion was filed on January 23, 1984, and the State of Oklahoma's (hereinafter referred to as the "State") Petition for Rehearing was denied on October 12, 1984.

Previously, the United States Supreme Court vacated the Respondent's death sentence in the present case, Eddings v. Oklahoma, 455 U.S. 104 (1982). That opinion reversed the decision of the Oklahoma Court of Criminal Appeals in Eddings v. State, 616 P.2d 1159 (Okl.Cr. 1980).

The Respondent's certification proceeding in the district court was affirmed by the Oklahoma Court of Criminal Appeals in Matter of M.E., 584 P.2d 1340 (Okl.Cr. 1978). This Court denied certiorari in that case in Eddings v. Oklahoma, 436 U.S. 921 (1978).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Monty Lee Eddings (hereinafter referred to as the "defendant") was charged as a juvenile with the crime of Murder in the First Degree in the District Court of Creek County, State of Oklahoma, for the intentional murder of Trooper Larry Crabtree of the Oklahoma

Highway Patrol. The defendant was certified to stand trial as an adult and that certification was affirmed on appeal. Matter of M.E., 584 P.2d 1340 (Okl.Cr. 1978). Certiorari was subsequently denied by the United States Supreme Court in Eddings v. Oklahoma, 436 U.S. 921 (1978).

The defendant then entered a plea of nolo contendere to an adult charge of Murder in the First Degree. The sentencing judge heard extensive testimony concerning aggravating and mitigating circumstances, and at the conclusion of three days of testimony, the defendant was sentenced to death by the court.

The defendant appealed the death sentence to the Oklahoma Court of Criminal Appeals, and the Judgment and Sentence was affirmed on March 21, 1980. Eddings v. State, 616 P.2d 1159 (Okl.Cr. 1980).

The defendant again petitioned the United States Supreme Court for a writ of certiorari and certiorari was granted. The Court heard arguments in the case, and on January 19, 1982, the Supreme Court reversed the case in part and remanded the case for further proceedings. Eddings v. Oklahoma, 455 U.S. 104 (1982).

On February 23, 1983, the Oklahoma Court of Criminal Appeals remanded the case to district court pursuant to the order of this Court.

On August 25 and 26, 1982, the district court heard additional mitigating evidence presented by the defendant. On August 26, 1982, the court again imposed the penalty of death upon the defendant.

Subsequently, in an unrelated case, the Oklahoma Court of Criminal Appeals ruled that if an error is made during the sentencing stage of a capital case

where the defendant has been sentenced by a jury, the death sentence must be modified to life imprisonment since there was no statutory procedure for re-sentencing before a different jury. Johnson v. State, 665 P.2d 815, 826-827 (Okl.Cr. 1983).

In the meantime, the defendant Eddings again appealed his death sentence to the Oklahoma Court of Criminal Appeals. On July 30, 1984, that Court issued an opinion modifying the death sentence of the defendant to life imprisonment. Eddings v. State, 688 P.2d 342 (Okl.Cr. 1984). The Court, in a 2-1 ruling, held that based on the United States Supreme Court case of Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), it was a violation of equal protection and due process for the defendant to be sentenced to death a

second time after the case had been remanded. The Court stated as follows:

> "We find Skinner analogous to the present case. Two people can commit identical offenses, and if one is sentenced by a jury and one is sentenced by the trial court with identical errors occurring in both sentencing stages, one is guaranteed modification to life imprisonment while the other may yet be sentenced to death. This distinction presents a grossly unfair, unequal application of the law, especially since those who plead guilty or nolo contendere are not entitled to be sentenced by a jury." 688 P.2d at 344; A. 7a, infra.

The Attorney General's Petition for Rehearing was denied by the Court in an opinion which added:

> "Arguing that there is no claim of a fundamental right violation in the present case, the Attorney General argues that a rational basis analysis should be applied rather than strict judicial scrutiny. We deem strict scrutiny essential in examining a law that would afford greater protection to one class of citizens--those who are sentenced to death by jury--than another--those who are sentenced to death by the court." 688 P.2d at 347; A. 20a, infra.

It is this interpretation of the Equal protection and Due Process Clauses of the Fourteenth Amendment that the State requests this Court to review.

REASONS WHY THE WRIT SHOULD BE GRANTED

THE COURT OF CRIMINAL APPEALS' DUE PROCESS AND EQUAL PROTECTION ANALYSIS IS INCORRECT AND THERE IS NO VIOLATION OF SUCH WHEN A STATE ALLOWS A JUDGE WHO MAKES A SENTENCING ERROR WHEN IMPOSING THE DEATH PENALTY TO CORRECT THE ERROR EVEN IF PERSONS WHO HAVE THEIR DEATH SENTENCES IMPOSED BY JURIES WILL HAVE THEIR DEATH SENTENCES MODIFIED TO LIFE IMPRISONMENT WHEN A SENTENCING ERROR OCCURS.

The defendant in this case waived his right to a jury trial, pled nolo contendere to First Degree Murder and was sentenced to death. Pursuant to Oklahoma statutes, his separate sentencing hearing was heard by the trial judge. Subsequently, the United States Supreme Court held that error occurred at the sentencing hearing and remanded

the case to the Oklahoma Court of Criminal Appeals. Eddings v. Oklahoma, 455 U.S. 104 (1982).

The Court of Criminal Appeals then held that the remand had violated the defendant's right to equal protection of the laws. The alleged violation occurred because the Court had previously held that Oklahoma statutes prevented a remand of a death penalty case solely for resentencing where the capital defendant had been tried and sentenced by a jury. Johnson v. State, 665 P.2d 815 (Okl.Cr. 1983). Relying on Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court below reasoned that equal protection principles prevented the State from being able to resentence capital defendants who waived jury trial when the State could not resentence those defendants who were tried by jury.

The State asserts that the Oklahoma Court of Criminal Appeals' decision is faulty on several grounds. The Court below did not utilize this Court's current analysis of alleged equal protection violations. The Court below also erroneously employed strict judicial scrutiny. The proper analysis should have been the "rational basis" standard.

The Court below also incorrectly found that the State invidiously classifies capital defendants. In reality, capital defendants make voluntary choices as to their pleas and the type of trial they desire which may or may not affect the appellate court's ability to remand their cases to remedy sentencing errors. Even if this Court finds that Oklahoma law classifies capital defendants, the Court below did not accurately identify the classes of defendants, and the State has a rational

basis for treating capital defendants who do not contest their guilt differently from those who demand a trial for purposes of appellate mandated resentencing.

The pertinent part of the opinion of the Oklahoma Court of Criminal Appeals in the equal protection issue is as follows:

> "We find Skinner analogous to the present case. Two people can commit identical offenses, and if one is sentenced by a jury and one is sentenced by the trial court with identical errors occurring in both sentencing stages, one is guaranteed modification to life imprisonment while the other may yet be sentenced to death. This distinction presents a grossly unfair, unequal application of the law, especially since those who plead guilty or nolo contendere are not entitled to be sentenced by a jury. See 21 O.S.1981, § 701.10. All cases in which error occurred only in the sentencing stage should be remanded for resentencing or none should be." Eddings v. State, 688 P.2d 342, 344 (Okl.Cr. 1984).

The Court below pointed out a perceived unequal result without determining

whether the result flowed from the defendant's voluntary choice or from a statutory classification.

Oklahoma statutes provide for a "second-stage" sentencing hearing to determine if the defendant receives a death sentence or life imprisonment. Okla. Stat. Ann., Title 21, § 701.10 (West 1984), provides for the sentencing procedure as follows:

> "Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if th defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. . . ."

Under Oklahoma law, a defendant charged with First Degree Murder has several choices which affect the type of trial he receives. He has the right to

demand a jury trial in which the same jury that determined his guilt also determines his sentence. He has the right to waive jury trial and have a trial judge determine his guilt and his sentence. He may also do what the defendant did in the instant case. He may waive his right to have his guilt determined by pleading nolo contendere or guilty. In this latter case, a sentencing hearing is conducted before a trial judge. A defendant is absolutely entitled to any of the above three choices.

The differing treatment of capital defendants only occurs if the appellate court finds that prejudicial error occurred in the sentencing portion of the defendant's trial. As stated previously, in Johnson v. State, supra, 665 P.2d 815, the Oklahoma Court of Criminal Appeals construed the Oklahoma statutes to forbid a remand of a death penalty

case tried to a jury solely for resentencing because the identical jury that determined guilt had to determine the sentence. The Johnson case was partly based on the fact that the Oklahoma Legislature did not specifically adopt a resentencing procedure but also because of the practical inability of resentencing the defendant before the same jury. This practical consideration is not present when the case is tried to a trial judge since the same judge that initially heard the case would rehear it. This was precisely what happened in the instant case.

However, the differing results do not occur because of the State's classification. They occur because of a practical inability to reassemble the same jury to resentence the defendant and the fact that the defendant in this case chose a judge over a jury. Simply

because the exercise of a choice results in differing treatment does not mean the State has "classified" anyone.

In North Carolina v. Pearce, 395 U.S. 711 (1969), a criminal defendant appealed his conviction and obtained a new trial. Upon retrial he received a harsher sentence. He argued that the State had classified defendants who sought new trials and those who did not. He argued that those who were not retried were absolutely insulated from a harsher sentence, whereas those who requested a new trial were subject to a heavier sentence. This Court held that the State did not "classify" any defendant, but rather differing results occurred from the interplay of a number of variables:

> "Putting that conceptual nicety to one side, however, the problem before us simply cannot be rationally dealt with in terms of 'classification.' A man who is retried after his first

> conviction has been set aside may be acquitted. If convicted, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. The result may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a State has invidiously 'classified' those who successfully seek new trials, any more than that the State has invidiously 'classified' those prisoners whose convictions are not set aside by denying the members of that group the opportunity to be acquitted. To fit the problems of this case into an equal protection framework is a task too Procrustean to be rationally accomplished." 395 U.S. at 722, 723 (emphasis original).

Such is the case in Oklahoma. The defendant in this case could have elected to be tried by jury. If the appellate court had found prejudicial error in the guilt/innocence phase of the trial, defendant could have been retried and given the death sentence again under Oklahoma law. Binsz v. State, 675 P.2d 448 (Okl.Cr. 1984); Coleman v. State, 670 P.2d 596 (Okl.Cr. 1983). As stated before, if only a sentencing error

occurs in a jury case the appellate court's only option is modification. Johnson v. State, supra.

This Court's decision in Corbitt v. New Jersey, 439 U.S. 212 (1978) is dispositive of the equal protection issues in the case at bar. New Jersey law provided that those accused of murder could choose between a jury trial or pleading non vult. New Jersey forbade murder trials to the trial judge alone and forbade guilty pleas to murder. If the defendant opted for a jury trial, the jury could find the defendant guilty of first degree murder and the judge would impose a mandatory life sentence. The jury could alternatively find a defendant guilty of second degree murder and he could receive up to thirty years imprisonment.

A defendant who pled non vult when he was charged with first degree murder

could receive life imprisonment or the punishment for second degree murder. The defendant in Corbitt was tried by jury and received a life sentence. He argued this violated equal protection since a first degree murder defendant faced a mandatory life sentence if he went to trial and was convicted, but the defendant who pleaded non vult when charged with first degree murder at least had the chance of receiving a lesser sentence. This Court rejected the defendant's argument as follows:

> "Appellant also argues that the sentencing scheme infringes his right to equal protection under the Fourteenth Amendment because it penalizes the exercise of a 'fundamental right.' We rejected a similar argument in North Carolina v. Pearce, 395 U.S. 711 (1969), noting that '[t]o fit the problem . . . into an equal protection framework is a task too Procrustean to be rationally accomplished.' Id., at 723. All New Jersey defendants are given the same choice. Those electing to contest their guilt face a certainty of life imprisonment if convicted of first-degree murder; but they may be acquitted instead or,

in a proper case, may be convicted of a lesser degree of homicide and receive a sentence of less than life. Furthermore, a plea of non vult may itself result in a life sentence. The result, therefore,

> "'may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a state has invidiously "classified" . . .' Id., at 722. . . .
>
> "It cannot be said that defendants found guilty by a jury are 'penalized' for exercising the right to a jury trial any more than defendants who plead guilty are penalized because they give up the chance of acquittal at trial. In each instance, the defendant faces a multitude of possible outcomes and freely makes his choice. Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision." 439 U.S. 225-226 (emphasis original).

As in Corbitt, the defendant in the instant case had several choices. The defendant in this case may be resentenced to death, not because Oklahoma as invidiously classified him or violated a fundamental right, but because he chose to waive his right to a trial by jury

and, thereafter asked the appellate court to remedy errors in his sentencing. The Oklahoma court erred by merely pointing to perceived unequal treatment and finding a constitutional violation. No violation of equal protection has occurred by resentencing this defendant to death.

As stated before, the Court of Criminal Appeals did not correctly identify the particular classes of capital defendants under Oklahoma law. The court identified two classes of defendants: (1) capital defendants tried and sentenced by a jury, and (2) capital defendants tried and sentenced by the judge.

However, a brief look at Oklahoma's capital sentencing statute reveals three, not two, identifiable classes of defendants for purposes of capital sentencing. The correct classifications for sentencing are: (1) capital

defendants tried and sentenced to a jury; (2) capital defendants tried and sentenced by a trial judge; and (3) capital defendants who waive trial and are sentenced by a trial judge.

It is imperative that this third class, to which the defendant in this case belongs, be correctly identified since the State's interest and the defendant's rights in the event the conviction or sentence are overturned on appeal, are different in each case. It must also be pointed out that the alleged inequity in this case only arises where there is a sentencing error alone. The Oklahoma Court of Criminal Appeals has not hesitated to remand a death case for retrial and resentencing when error occurs affecting the underlying conviction itself. Binsz v. State, supra, 675 P.2d at 448. Each class of these defendants is equally subject to the death sentence again.

The threshold requirement in the analysis of any alleged equal protection violation is to identify the proper standard of review or "level of scrutiny." As this Court held in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976):

> ". . . [E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." 427 U.S. at 312.

None of the above classes of defendants are members of a "suspect" class recognized by this Court. The defendant's "class" is not suspect since:

> ". . . this class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection for majoritarian political process. San Antonio Independent School District v. Rodriquez, 411 U.S. at 28."

There also appears to be no burden of a fundamental right. The State of Oklahoma is not aware of a right of defendants not to be resentenced to death if an appellate court remands a case for resentencing. Double jeopardy principles do not forbid sentencing a capital defendant to death upon remand unless he received a sentence of life imprisonment in his first trial. Arizona v. Rumsey, 104 S. Ct. 2305 (1984); Bullington v. Missouri, 451 U.S. 430 (1981). According to the Court of Criminal Appeals, capital defendants have a statutory right under 21 Okla. Stat. Ann., § 701.10 (West 1984) to be sentenced by the same fact finder that determined their guilt. This right is not a fundamental right protected by the Constitution. As this Court observed in Ross v. Moffitt, 417 U.S. 600 (1974):

> "Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court." 417 U.S. at 611-612.

When a state law does not involve a fundamental interest or affect a suspect class, the correct test in determining the constitutionality of the statute is ". . . whether the statute has a rational relation to the legitimate state interest." Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977). The rational basis standard:

> ". . . employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative one. Perfection in making the necessary classifications is neither possible nor necessary. Dandridge v. Williams, supra, 397 U.S., at 485. Such action by a legislature is presumed to be valid." Massachusetts Bd. of Retirement v. Murgia, supra, 427 U.S. at 314.

The rational basis standard has been applied to alleged equal protection violations arising in capital cases. Dobbert v. Florida, 432 U.S. 282 (1977). In Dobbert, the defendant had committed a murder prior to this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). The Florida Supreme Court resentenced all of the person serving death sentences to life imprisonment who had been sentenced prior to Furman. The Florida Legislature amended its death penalty statutes in 1973 which statutes were held to be constitutional. Proffitt v. Florida, 428 U.S. 242 (1976).

The defendant in Dobbert was tried after the statutes were amended and received a death sentence. He argued that this was a violation of equal protection since if he had been tried and sentenced before Furman he would have received a

life sentence. This Court applied the rational basis standard and pointed out that the State of Florida had to draw a line somewhere in deciding which defendants would be subject to the new law. This Court further pointed out that the defendant was not "similarly situated" to the pre-Furman defendants and that all capital defendants tried after Furman were treated equally. 432 U.S. at 301.

In Schlib v. Kuebel, 404 U.S. 357 (1971), this Court addressed the issue of equal protection in ruling on the Illinois bail system. The Illinois statute provides three ways in which an accused can retain up to one percent (1%) of the bail as an administrative cost. The Court stated:

> The Court more than once has said that state legislative reform by way of classification is not to be invalidated merely because the legislature moves one step at a time. 'The

prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). 'Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them. . . . With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."' McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969). The measure of equal protection has been described variously as whether 'the distinctions drawn have some basis in practical experience,' South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966), or whether the legislature's action falls short of 'the invidious discrimination.' Williamson v. Lee Optical Co., 348 U.S., at 489, or whether 'any state of facts reasonably may be conceived to justify' the statutory discrimination, McGowan v. Maryland, 366 U.S. 420, 426 (1961).

* * * *

"But the Court also has refined this traditional test and has said that a statutory classification based upon suspect criteria or affecting 'fundamental rights' will encounter equal protection difficulties unless justified by a 'compelling governmental interest.' Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969); Oregon v. Mitchell, 400 U.S. 112, 247 n. 30

(1970) (opinion of Brennan, White, and Marshall, JJ.).

> "Bail, of course, is basic to our system of law, Stack v. Boyle, 342 U.S. 1 (1951); Herzog v. United States, 75 S.Ct. 349, 351, 99 L.Ed. 1299, 1301 (1955) (opinion of Douglas, J.), and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment. Pilkinton v. Circuit Court, 324 F.2d 45, 46 (CA8 1963). [Citations omitted.] But we are not concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness. Our concern, instead, is with the 1% cost-retention provision. This smacks of administrative detail and of procedure and is hardly to be classified as a 'fundamental' right or as based upon any suspect criterion. The applicable measure, therefore, must be the traditional one: Is the distinction drawn by the statutes invidious and without rational basis.'" 404 U.S. at 364-365 (emphasis added).

In McGinnis v. Royster, 410 U.S. 263 (1973), the Court addressed the equal protection issue as applied to a New York statute which denied certain state prisoners good-time credit for parole eligibility for a period of their

presentence county jail incarceration. The Court stated:

> ". . . The determination of an optimal time for parole eligibility elicited multiple legislative classifications and groupings, which the court below rightly concluded require only some rational basis to sustain them. James v. Strange, 407 U.S. 128, 140 (1972) [citations omitted]. Appellees themselves recognize this to be the appropriate standard. For this Court has observed that '[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations--illogically, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913). We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulate state purpose. We conclude that it does." 410 U.S. at 270 (emphasis added).

See also, Johnson v. Louisiana, 406 U.S. 356, 363-365 (1972).

Contrary to the level of scrutiny employed by the court below, the correct standard of review of the Oklahoma law should have been the rational basis standard. The State of Oklahoma can

rationally provide for resentencing where a capital defendant waives his right to trial because he has already knowingly waived his right to have the same fact finder that determined his sentence. This is so even though capital defendants who were tried and sentenced by a jury may not be resentenced to remedy sentencing errors.

CONCLUSION

The unfairness of the present case to the State is apparent and is the sort which causes great public cynicism toward our criminal justice system. The defendant may now escape the death penalty due to one ambiguous sentence uttered by the judge at his sentencing in 1978, on an issue which was not even raised until he filed his brief-in-chief in the United States Supreme Court. See, Eddings v. Oklahoma, 455 U.S. 104, 120 (1982) (Burger, J., dissenting).

For a murderer of a law enforcement officer to evade punishment due to such a technicality cannot help but frustrate the "'ends of public justice.'" Illinois v. Somerville, 410 U.S. 458, 463 (1973).

For the reasons stated, it is respectfully requested that this Court grant certiorari and review the decision of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. C-78-325

MONTY LEE EDDINGS

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

July 30, 1984
Rehearing Denied October 12, 1984

OPINION

BRETT, Judge:

On April 4, 1977, the appellant, a sixteen-year-old juvenile, shot and killed Highway Patrol Trooper Crabtree on the Turner Turnpike with a sawed-off .410 guage shotgun. The crime occurred when Trooper Crabtree stopped appellant for a routine traffic violation. After the juvenile was certified to stand trial as an adult and the certification

order was affirmed by this Court, In re M.E., 584 P.2d 1340 (Okl.Cr.1978), appellant, upon advice of counsel, waived a jury trial and entered a plea of nolo contendere. At the conclusion of the presentation of evidence relevant to sentencing, the trial court imposed the death sentence. That sentence was appealed to this Court and was affirmed. Eddings v. State, 616 P.2d 1159 (Okl. Cr.1980).

Thereafter, appellant sought and was granted a writ of certiorari by the United States Supreme Court in Eddings v. Oklahoma, 450 U.S. 1040, 101 S.Ct. 1756, 68 L.Ed.2d 237 (1980). The Honorable United States Supreme Court reversed our affirmance of the death penalty for the reason that, in their opinion, both the trial court and this Court violated the rule of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d

973 (1978), by placing limitations upon the mitigating circumstances to be considered. The Supreme Court directed that "[o]n remand, the State courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." Eddings v. State, 455 U.S. 104, 117, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). As this Court does not weigh evidence, see, e.g., Woods v. State, 569 P.2d 1004 (Okl.Cr.1977); Tharps v. State, 555 P.2d 1054 (Okl.Cr.1976), we remanded the case to the Creek County District Court for further proceedings in accordance with the directions of the United States Supreme Court. On August 25 and 26,

1982, the district court[1] heard additional evidence presented by appellant and again imposed the death penalty. From the order of August 26, 1982, this appeal has been lodged.

We now realize that it was error to remand the case to the district court for resentencing and that the death sentence must be modified to life imprisonment.

Upon rehearing Johnson v. State, 665 P.2d 815 (Okl.Cr.1982) we stated the following:

> "We are now convinced that a plain reading of 21 O.S.1981, § 701.13, does not authorize this Court to remand a death case, tried before a

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[1] On May 3, 1982, appellant sought issuance of the writ of prohibition in this Court to prevent the Honorable Charles S. Woodson from hearing the case on remand, insofar as he was the trial judge at appellant's trial. This Court denied the writ.

jury, solely for a resentencing before a different jury, even when error occurs only in the sentencing stage. Section 701.13(E) provides that with regard to review of death sentences, this Court shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"Therefore, since this Court is unwilling to speculate as to the effect the improper aggravating circumstance, murder for remuneration, had on the jury's recommendation to impose the death penalty, we find it necessary to modify the sentence to life imprisonment in accordance with Section 701.13(E). When prejudicial error occurs in the sentencing stage of the trial only, this Court has consistently modified the death sentence to life imprisonment and otherwise affirmed. See Odum v. State, 53 O.B.A.J. 2264, 651 P.2d 703 (Okl. Cr.1983); Burrows v. State, 640 P.2d 533 (Okl.Cr.1982); Irvin v. State, 617 P.2d 588 (Okl.Cr.1980). See also our opinion handed down today in Boutwell v. State, 659 P.2d 322 (Okl.Cr.1983), in which this Court reached the same result on these grounds."

Id., at 827.

Although Johnson has heretofore been limited in application to those case in

which the sentence is set by a jury, we believe that equal protection and due process require that the procedure obtain equally in cases in which the judge determines the sentence.

In finding Oklahoma's Habitual Criminal Sterilization Act unconstitutional, the United States Supreme Court stated:

> "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins, supra; Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208. Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who committs embezzlement lacks. . . . Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would

> indeed be a formula of empty words if such conspicuously artificial lines could be drawn. See Smith v. Wayne Probate Judge, 231 Mich. 409, 420, 421, 204 N.W.140, 40 A.L.R. 515.

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655, 1660 (1942).

We find Skinner analogous to the present case. Two people can commit identical offenses, and if one is sentenced by a jury and one is sentenced by the trial court with identical errors occurring in both sentencing stages, one is guaranteed modification to life imprisonment while the other may yet be sentenced to death. This distinction presents a grossly unfair, unequal application of the law, especially since those who plead guilty or nolo contendere are not entitled to be sentenced by a jury. See 21 O.S. 1981, § 701.10. All cases in which error occurred only in the sentencing stage should be

remanded for resentencing or none should be.

Inasmuch as this Court is without authority to remand jury-tried cases for resentencing under these circumstances, we must also modify to life imprisonment cases where the trial court erred in its imposition of the death penalty. Equality in appellate disposition is especially important in this area as defendants who plead guilty or nolo contendere are not entitled to be sentenced by a jury. See 21 O.S. 1981, § 701.10.

The death penalty rendered in this case must be, and hereby is, MODIFIED to life imprisonment. The other assignments of error raised need not be discussed in light of this decision.

PARKS, J., specially concurs.

BUSSEY, P.J., dissents.

PARKS, Judge, special concurrence:

I will preface my special concurrence in this case by noting that I was not sitting on this honorable court when this case was originally decided. After a careful review of the record, the Supreme Court decision, and hearing oral argument, I feel qualified to express the following opinion in concurrence.

At the outset, I agree with Judge Brett's majority position that remanding the case for resentencing was in error, and that modifying the sentence to life is appropriate in this instance. The unequal treatment of those who select a jury trial and those who waive jury trials flies in the face of fairness and equal protection under the law. Modification for errors in sentencing is the proper remedy in either non-jury or jury trial situations. I also agree with Woods v. State, 569 P.2d 1004 (Okl.Cr. 1977), which makes it clear that the

Court of Criminal Appeals does not weigh evidence. I feel, however, an obligation to comment on the evidence in mitigation, and feel compelled to express my concerns for the treatment of a juvenile offender as is involved in this case.

Although it is unnecessary as to the disposition of this case to comment on important mitigating factors, the Supreme Court, in Eddings v. State, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), found that "the evidenced Eddings offered was relevant mitigating evidence." Id. at 115, 102 S.Ct. at 877. The court also said that to exclude any mitigating evidenced as a matter of alw violated that court decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978).

Noting that the Supreme Court found error in the sentencing proceeding and remanded with specific instructions to

consider all mitigating circumstances, certainly that Court found merit in the mitigation arguments.

The Supreme Court made it very clear that there were important mitigating factors that should have been considered in sentencing the appellant.

The appellant in this case was sixteen years old at the time of the murder. There was also evidence of a turbulent family background. The Supreme Court succinctly summarized the age factor as follows:

> "Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juveinle with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of

> murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."

Eddings v. State, 455 U.S. 104, 116, 102 S.Ct. 869, 877, 71 L.Ed.2d 112 (1982).

The chronological age of the appellant must be examined with an understanding of the uniqueness of that stage of development of a youth. The court cites various journal articles and reports that relate to the unique period of social and mental development existing in teenagers. A pertinent article is contained in footnote 11 of the opinion, which, in part, is as follows:

> "[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control

> their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

In fact, the court also states that "Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults." Eddings v. Oklahoma, Id. at 115, 116, 102 S.Ct. at 877, 71 L.Ed.2d at 11.

The general concern for the treatment of youth in our society should not be taken lightly. The State of Oklahoma has enacted a juvenile system which is designed to reform and rehabilitate juveniles that have broken laws. Oklahoma has taken many steps to protect

juveniles, as have most jurisdictions of the United States.[1] The chronological age of the juvenile involved, coupled with the emotional and mental development of the juvenile, are important factors when dealing with any person, and becomes especially important when dealing with juveniles. The concern and care for juveniles is important to the very existence of society, and laws and social structures designed to protect and benefit juveniles are potentially the areas of greatest triumph for our system of justice. "The spectacle through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral

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1. See In re Gault, 387 U.S. 1, 14, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967).

responsibility to protect and nurture children."[2] The case of Monty Lee Eddings is an example of why our system of justice exists. Applied properly, juveniles will be protected and nurtured, and when necessary, the proper punishments assessed.

It is pertinent to note that Oklahoma has not executed any juveniles for crimes which they have committed. Now is not the time to begin. The evidence of mitigation in this cas should have weighed heavily in the minds of the fact finder. A life sentence, rather than death, is appropriate punishment. It is not excusing the crime to modify the

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2. "Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed while Under Age Eighteen," 36 Okla.L.Rev. 613 (1983).

sentence to life. Life imprisonment, under the circumstances, is punishment enough for this child.

BUSSEY, Presiding Judge, dissenting:

I must respectfully dissent. My dissent is predicated upon my belief that the majority in Johnson v. State, 665 P.2d 815 (Okl.Cr.1982), incorrectly interpreted our statute to prohibit the remanding of a case for a resentencing hearing when the only eror occurred during the sentencing stage. The instant case would provide an excellent opportunity to expressly overrule Johnson, supra, and carry out the clear legislative intent. Moreover, I find nothing in the opinion of the U.S. Supreme Court that mandates automatic modification from death to life because of the age of the defendant.

I strongly recommend that the Oklahoma Legislature consider amending our

death penalty statute in order to express its intent with unmistable certainty. (Emphasis added) A select committee of the legislature could carefully study the rcent decisions of the U.S. Supreme Court affirming the death penalty, in order to eliminate technical constructions which preclude its just enforcement. See for instance, Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340, handed down on July 2, 1984, wherein a majority of the Supreme Court upheld the Florida capital punishment sentencing procedure.

OPINION ON REHEARING

BRETT, Judge:

Upon petition for rehearing, and on behalf of the State of Oklahoma, the Attorney General's office urges this Court to overrule Johnson v. State, 665 P.2d 815 (Okl.Cr.1983), and reinstate Monte Lee Eddings' sentence of death,

or, in the alternative, to apply a rational basis analysis and distinguish Johnson--a case tried by jury--from judge-tried cases. We decline to do either.

In Johnson v. State, this Court interpreted the intent of the Legislature in regard to our death penalty statutes and concluded that "[h]ad the Oklahoma Legislature intended to provide for retrial of the sentencing proceeding only, as did Georgia, then it could have enacted a similar procedure." 665 P.2d at 826. In his dissent in the instant case, Judge Bussey states his belief that

> the majority in Johnson v. State, 665 P.2d 815 (Okl.Cr.1982), incorrectly interpreted our statute to prohibit the remanding of a case for a resentencing hearing when the only error occurred during the sentencing stage. The instant case would provide an excellent opportunity to expressly overrule Johnson, supra, and carry out the clear legislative intent.

When this Court handed down its decision in Johnson--February 8, 1983--the Oklahoma Legislature was still in session. The Oklahoma Legislature could have then, or in its most recent session, enacted a procedure for resentencing had it felt that this Court had misinterpreted the legislative intent. The Oklahoma Legislature did not do this. Thus, we must conclude that the Johnson interpretation was correct, and that we have carried out the clear legislative intent. Our decision upon rehearing Johnson is therefore reaffirmed.[1]

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1. This holding does not affect our ruling in Nipps v. State, 626 P.2d 1349 (Okl.Cr.1981), wherein the case was remanded for resentencing after the enhancement provision under which the defendant was sentenced was determined to be unconstitutional and the crime provided no minimum sentence. In the present case there is a minimum sentence,

Arguing that there is no claim of a fundamental right violation in the present case, the Attorney General argues that a rational basis analysis should be applied rather than strict judicial scrutiny. We deem strict scrutiny essential in examining a law that would afford greater protection to one class of citizens--those who are sentenced to death by jury--than another--those who are sentenced to death by the court. Therefore, we do not consider the State's argument to be persuasive.

Footnote 1 (cont.)

that is, life imprisonment. Furthermore, as a death penalty case is unique in its severity and punishment, the courts are particularly sensitive to insure that every safeguard is observed. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

As the State has offered no compelling justification for the distinction urged, the sentence of death must be, and is, MODIFIED. The court clerk is ordered to issue the mandate forthwith.

PARKS, J., specially concurs.

PARKS, Judge, specially concurring:

I specially concur due to dicta in footnote #1. I do not agree with the principles found therein.